GUAN JOO (PENANG) SDN. BHD.

v.

CHEE SENG & CO. SDN. BHD.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING SUMMONS NO. 376 OF 1984]
28 DECEMBER 1984

CIVIL PROCEDURE: *Injunction - Restraint of withdrawal of arrears of rental - Appeal pending in High Court - Interlocutory injunction - Serious question to be tried - Contempt of Court - Consent orders - Variation - Frivolous and vexatious - Abuse of process of Court - Estoppel - Res judicata - Final and conclusive.*

The defendants commenced legal action against the plaintiffs on 4 October 1978 for vacant possession of one bay of godown and for double rent and mesne profit *vide* Civil Action No. 973/78 and obtained judgment in default on 15 September 1982. The plaintiff applied for the setting aside of the said judgment but this was dismissed with costs. The plaintiffs then filed an appeal against this dismissal of their application. On a later date, the plaintiffs also applied for stay of execution and at the hearing, a consent order was made for the stay of execution upon the plaintiffs paying into Court all double rentals and costs as per the judgment entered against them.

The plaintiffs had not complied with the said order and the defendants filed an application to vacate the order for stay of execution but this was dismissed by the Magistrate. The defendants then filed an application for payment out to the defendants of all single rentals only. At the hearing, the Magistrate adjourned the matter for decision on a said date and two days before this date, the plaintiffs filed these proceedings in this Court for an order of this Court for an injunction to restrain the defendants from withdrawing all arrears of rental due to them from the plaintiffs until the final disposal of an appeal pending in the High Court. At the lower Court hearing, the Magistrate dismissed the defendants' application for payment out to the defendants by the plaintiffs of all single rentals only. The defendants were granted liberty to file afresh for variation of the consent orders before the same Magistrate who had made the decisions.

The defendants then filed a second application and one of the reliefs sought for was similar to the first application, the other relief was for leave to vary an Order of the Court to give effect to the reliefs sought. The hearing of this application has been postponed until the decision of this originating summons.

Held:

[1] Upon considering both applications and supporting affidavits, the defendants' second application is similar to the first one in regard to payment of single rentals. However the second application was made on the basis that a fresh application was filed before the same Magistrate who had heard and made the earlier Orders. There is therefore no finality in respect of the first application and the defendants are not precluded by estoppel or on the ground of *res judicata.*

[2] The plaintiffs' prayer that the defendants be punished for contempt of Court is misconceived. The defendants are entitled to apply for an Order to vary the consent orders.

[3] The plaintiff's application in this originating summons is unnecessary, frivolous and vexatious. From the circumstances mentioned above, it can be inferred that the intention of the plaintiffs was nothing more than to frustrate the defendants from proceeding with further action in the lower Court. Instead of contesting or opposing the application, the plaintiffs filed for an injunction and this is an abuse of the process of Court.

[4] From the facts and circumstances available from the relevant affidavits, there is no serious question to be tried and the plaintiffs' application is refused with costs.

[Defendants' application allowed.]

Cases referred to:
Castro v. Murray [1875] 10 Ex 213
Dawkins v. Prince Edward of Weimar [1876] 1 QBD 499
American Cyanamid & Co. v. Ethicon Ltd. [1975] 1 All ER 504

Legislation referred to:
Courts of Judicature Act 1964, ss. 33, 35

Other sources referred to:
Res Judicata, Spencer Bower & Turner 2nd Edn., p. 371
Mallal's Supreme Court Practice 2nd Edn. p. 225

For the plaintiffs - Wong Hoong Yin; M/s. Wong Hoong Yin & Co.
For the defendants - S.P. Annamalai; M/s. Annamalai & Co.

JUDGMENT

Mohamed Dzaiddin J:

By this originating summons the plaintiffs seek an order of this Court for an injunction to restrain the defendants from withdrawing all arrears of rental due to them from the plaintiffs in respect of Magistrate's Court, Penang, Civil Action No. 973/78 until the final disposal of an appeal which the plaintiffs have filed in the High Court against the decision of the learned Magistrate *vide* Penang High Court Civil Appeal No. 62/82.

Secondly, the plaintiffs pray for an order that the defendants be charged for contempt of Court for tampering or acting contrary to the Consent Orders dated 12 May 1982 and 9 April 1983 respectively by making a frivolous application filed in the Magistrate's Court on 9 March 1984.

In support of their application, the plaintiffs rely on the facts as deposed in the affidavits of their Director, Mr. Low Keang Chai affirmed on 4 July (Encl. 2) and 25 October 1984 (Encl. 8). The defendants, on the other hand, in their reply rely on the affidavit of their Chairman, Mr. Chan Siew Teong affirmed on 5 October 1984 (Encl. 5), which said affidavit was filed in support of their application (Encl. 6) for the following Orders:

(1) an order that the causes or matters commenced against the defendants herein by different plaintiffs in Penang High Court, Originating Summons Nos. 375, 377, 378, 379, 380 and 381 of 1984 be consolidated with this cause or matter herein and be tried at the same time;

(2) an order that the plaintiffs' claim herein be dismissed as they are frivolous or vexatious and abuse of the process of the Court and/or would occasion injustice to the defendants.

(3) an order that all the arrears of single rentals paid and deposited into Court in Penang 1st Magistrate's Court, Civil Action No. 973 of 1978 be paid out to the defendants hereafter until final disposal of the appeal to the High Court against the Judgment dated 15 September 1982 therein;

(4) such further or other order that this Honourable Court deems fit proper and necessary in the interest of justice and in the exercise of its revisionary and supervisory powers under s. 33 and 35 of the Courts of Judicature Act, 1964; and

(5) an order that the plaintiffs do pay the costs of these proceedings to the defendants.

Let me first recite briefly the circumstances leading to the filing of this originating summons. The defendants commenced legal action against the plaintiffs on 4 October 1978 for vacant possession of one bay of godown No. 125, Weld Quay Foreshore, Penang and for double rent and mesne profit *vide* Penang First Magistrate's Court Civil Action No. 973/78 and obtained judgment in default on 15 September 1982.

The plaintiffs applied for setting aside of the said Judgment by an application dated 21 September 1982 but the learned Magistrate dismissed same with costs on 20 October 1982. Obviously, the plaintiffs did not appeal against the said default judgment but filed an appeal on 23 October 1982 against the decision dismissing their application.

In the meantime, the plaintiffs had by their application dated 26 October 1982 applied for stay of execution and at the hearing thereof and by consent an Order of Court dated 9 April 1983 was entered into for stay of execution upon the plaintiffs paying into Court all double rentals and costs as per the judgment entered against them.

The plaintiffs had not complied with the said Order and the defendants then filed an application dated 17 August 1983 to vacate the order for stay dated 9 April 1983 but the learned Magistrate dismissed the defendants' application with no order as to costs as the plaintiffs had substantially complied albeit late the requirements of the said order.

In view of the delay in this matter and as the plaintiffs were continuing in the use and occupation of godown bays the defendants filed in the application dated 9 March 1984 supported by an affidavit of Mr. Chan Siew Teong affirmed on 8 March 1984 for payment out to the defendants of **all single rentals** only.

The said application came up for hearing on 25 June 1984 and after hearing submissions by both Counsel for plaintiffs and defendants the learned Magistrate adjourned the matter for decision on 6 July 1984. Meanwhile, two days before the decision, the plaintiffs herein on 4 July 1984 filed these proceedings in this Court. On 6 July 1984 the learned Magistrate dismissed the defendants' application with liberty to file afresh for variation of the consent orders before the same Magistrate who had made the decisions.

The 9 March 1984 application in the First Magistrate's Court was for an order for payment out to the defendants all the single rentals from 1 January 1980 until 31 March 1984 amounting to RM17,403.75 and monthly rentals of RM341.25 from 1 April 1984 onwards until final disposal of the appeal to the High Court.

Consequent to the dismissal of this application, the defendants filed a second application on 28 July 1984 which was fixed for hearing on 27 August 1984. The reliefs sought by the defendants in this second application are for arrears of single rentals similar to the first application and for leave to vary the Order of Court dated 9 April 1983 to give effect to the reliefs sought therein. This 9 April 1983 Order is a consent order whereby all execution proceedings of judgment of 15 September 1982 be stayed and the plaintiffs were permitted to continue to be in possession of the said premises upon payment into Court all the double rentals and costs due and payable until final disposal of the appeal by the High Court. At this stage, one should be reminded that until now the appeal record is still in the process of

preparation by the Lower Court. The hearing of the second application at the First Magistrate's Court has now been postponed until the decision of the present originating summons.

The plaintiffs' application is supported by two affidavits of their Director, Low Kean Chai, affirmed on 4 July 1984 (Encl. 2) and 25 October 1984 (Encl. 8), in which references are made to the defendants' Notice of Application dated 9 March 1984 and two Consent Orders dated 12 May 1982 and 9 April 1983. In addition, the second affidavit also made references to another Notice of Application dated 28 July 1984 which, the deponent contended, was similar to 9 March Notice of Application.

Mr. Wong, Counsel for the plaintiffs in his submission laid stress on these two applications. He stated that the first application was dismissed with costs by the learned Magistrate on 6 July 1984, therefore the second application dated 28 July 1984 which was similar in nature was frivolous, vexatious and an abuse of the process of Court. In fact, Counsel had submitted that the defendants should be estopped from making the subsequent application on the principle of *res judicata*.

I have called for the Notes of Evidence in MCCA. No. 973/1978 where the learned Magistrate dismissed the application with costs without giving any reason. However, she recorded the submission of Mr. Wong as follows:

> If application make on this ground it should be a variation order and should be heard before Miss Ho who gave consent order. Pray for application of plaintiff to be dismissed with costs.

With regard to the second application dated 28 July 1984 the relief sought by the defendants is similar in that all the arrears of single rental from 1 January 1980 until 31 July 1984 be paid out to the plaintiffs with further Orders that rentals from 1 August 1984 onwards until final disposal of appeal to the High Court be also paid out to the plaintiffs. In addition, the plaintiffs pray that the Order of Court dated 9 April 1983 be varied or altered as may be necessary to give effect to the above application i.e, for payment out to the plaintiffs.

Upon considering both applications and supporting affidavits, it is my finding that the second application is similar to the first one in respect of prayer for payment out of single rentals. However, the second application was made on the basis that a fresh application was filed before the same Magistrate who had heard and made the earlier Orders. There is, therefore, no finality in respect of the first application dated 9 March 1984. For these reasons the defendants are not precluded by estoppel or on the ground of *res judicata.* In *Res Judicata*, by Spencer-Bower & Turner (Second Edition) at p. 371 the learned authors say as follows:

> For the purpose of estoppel *per rem judicatam*,..., the judicial decision relied upon as creating the estoppel must be shown to have been final in both the senses there indicated: that is to say, there is no estoppel if the judicial decision, as recorded, is imperfect, provisional, indefinite, or ambiguous, or if, though *ex facie* appearing to be final, it is liable, whether at common law, or by statute, to be rescinded, varied, or reopened by the tribunal which pronounced it.

With regard to the plaintiffs' prayer that the defendants be punished for contempt for tampering or acting contrary to the two Consent Orders and making frivolous application, it is my finding that this prayer is misconceived. On Counsel's own submission in the Magistrate's Court (see Notes of Evidence), it is evident that he was suggesting that the application made by the defendants in the lower Court should be for a variation of the Consent Order dated 9 April 1983 which he said ought to have been heard before Miss Ho who gave the Consent Order. I cannot see how on the plaintiffs' Counsel's own submission,

the application of the defendants can now be regarded as amounting to a contempt of Court, in the sense that there is a deliberate disobedience to the order of the Court. The defendants are entitled to apply for an order to vary the consent orders.

Having considered the plaintiffs' application in this originating summons, in my opinion their application is obviously unnecessary, frivolous and vexatious. It is to be noted that this application by the plaintiffs was filed on 4 July 1984, two days before the learned Magistrate was scheduled to give her decision in respect of the defendants' application for payment to them all single rentals for the premises in question which was heard on 25 June 1984 and judgment was reserved to 6 July 1984. From the circumstances mentioned above, it can be inferred that the intention of the plaintiffs was nothing more but to frustrate the defendants from proceeding with further action in the lower Court. The plaintiffs could contest or oppose the application at the Magistrate's Court, but instead chose to file this originating summons for an injunction against the defendants. In my opinion, this is an abuse of the process of Court because the issue to prevent the defendants from proceeding with their application could and therefore should have been opposed or litigated at the lower Court. *Mallal's Supreme Court Practice* (Second Edition) at p. 225 states as follows:

> The process of the Court must be used *bona fide* and must not be misused. The Court will prevent the improper use of the Court process and will in a suitable case do so summarily where it has been used vexatiously and oppressively:
>
> *Castro v. Murray* [1875] 10 Ex 213;
>
> *Dawkins v. Prince Edward of Weimar* [1876] 1 QBD 499.

As the application of the plaintiffs is by way of injunction against the defendants restraining them from withdrawing all the arrears of rentals paid into Court by Consent Order until final disposal of the appeal, one of the principles which I have to consider in the exercise of my discretionary powers in granting such an interlocutory injunction is whether or not there is serious question to be tried in the sense that the claim was not frivolous or vexatious (*American Cyanamid & Co. v. Ethicon Ltd.* [1975] 1 All ER 504). From the facts and circumstances available from the relevant affidavits before me I am clearly of the opinion that there is no serious question to be tried. The appeal by the plaintiffs was against the Magistrate's decision dismissing their application. In so far as payment of arrears and current rentals are concerned, the defendants are entitled to be paid single rentals despite the outcome of the appeal. At any rate, if the plaintiffs are seriously objecting to the defendants' application, they ought to resort the dispute at the Magistrate's Court.

For these reasons, the plaintiffs' application is refused with costs. At the same time, I allow the defendants' application (Encl. 6) in terms of prayers (1), (2) and (3) therein.

Also found at [1986] 1 CLJ 204